1980

Arnold Machinery Company v. David M. Balls and Richard S. Johns Ii, Co-Partners, Dba Utah Excavating : Brief of Defendant-Respondents

Utah Supreme Court

John W. Lowe; Attorney for AppellantJames M. Richards; Attorneys for Richard S. Johns IIRichard C. Dibblee; Attorney for David M. Balls

IN THE SUPREME COURT
OF THE STATE OF UTAH

ARNOLD MACHINERY COMPANY, :

Plaintiff-Appellant, :

vs. : No. 16934

DAVID M. BALLS and RICHARD S. JOHNS II, co-partners, dba UTAH EXCAVATING, :

Defendant-Respondents. :

BRIEF OF DEFENDANT-RESPONDENTS

Appeal from a Judgment
of the Third District Court of Salt Lake County
The Honorable Homer F. Wilkinson, Judge

James M. Richards
RICHARDS, BIRD & KUMP
333 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Defendant-
Respondent Richard S. Johns II

Richard C. Dibblee
Suite 400, Ten Broadway Building
10 West 300 South Street
Salt Lake City, Utah 84101

Attorney for David M. Balls

John W. Lowe
LOWE & ASSOCIATES
1011 Walker Bank Building
Salt Lake City, Utah 84111

Attorney for Appellant

IN THE SUPREME COURT
OF THE STATE OF UTAH

ARNOLD MACHINERY COMPANY,	:	
Plaintiff-Appellant,	:	
vs.	:	No. 16934
DAVID M. BALLS and RICHARD S. JOHNS II, co-partners, dba UTAH EXCAVATING,	:	
Defendant-Respondents.	:	

BRIEF OF DEFENDANT-RESPONDENTS

Appeal from a Judgment
of the Third District Court of Salt Lake County
The Honorable Homer F. Wilkinson, Judge

James M. Richards
RICHARDS, BIRD & KUMP
333 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Defendant-
Respondent Richard S. Johns II

Richard C. Dibblee
Suite 400, Ten Broadway Building
10 West 300 South Street
Salt Lake City, Utah 84101

Attorney for David M. Balls

John W. Lowe
LOWE & ASSOCIATES
1011 Walker Bank Building
Salt Lake City, Utah 84111

Attorney for Appellant

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

IN THE SUPREME COURT
OF THE STATE OF UTAH

ARNOLD MACHINERY COMPANY,	:	
Plaintiff-Appellant,	:	
vs.	:	No. 16934
DAVID M. BALLS and RICHARD S. JOHNS II, co-partners, dba UTAH EXCAVATING,	:	
Defendant-Respondents.	:	

BRIEF OF DEFENDANT-RESPONDENTS

STATEMENT OF THE CASE

In this case plaintiff, as lessor, seeks to recover $13,889.64 for rent under an "Equipment Rental Agreement" from defendants who were co-partners doing business as Utah Excavating, as lessee, and $127.35 for repair work performed on the rental equipment which was a Drott, Model 50D Excavator.

DISPOSITION IN THE LOWER COURT

This matter was tried on the merits on January 15, 1980, before the Honorable Homer F. Wilkinson, District Judge, at the conclusion of which judgment was entered that the plaintiff take nothing on its claim for rent, having found that the "Equipment Rental Agreement" was intended for security and subject to the default requirements of the Utah Uniform Commer-

cial Code with which plaintiff had failed to comply by not giving defendants notice of sale after repossessing the equipment. Judgment in the amount of $127.35 was granted to plaintiff on its claim for repairs. The plaintiff has appealled from the judgment denying its claim for rent.

RELIEF SOUGHT ON APPEAL

Defendants respectfully submit that the judgment of the Lower Court should be affirmed and that the appeal of the plaintiff should be dismissed.

STATEMENT OF THE FACTS

A. DEFENDANT-RESPONDENT'S STATEMENT OF THE FACTS. On December 30, 1977, Arnold Machinery Company (hereafter "Arnold") leased to Utah Excavating, a partnership between Richard S. Johns II (hereafter "Johns") and David M. Balls (hereafter "Balls"), a Drott, Model 50D Excavator for a minimum period of six months and thereafter until the lease was terminated according to the terms and provisions stated in the agreement. The rental was $3,900 per month during the minimum rental period and continued at the same rate thereafter. (Ex. 1-P) Utah Excavating was also required to pay property tax, sales tax and insurance, making a total monthly payment of $4,273.73. (Ex. 3-P). The parties also executed a "Rental Equipment Purchase Option" which provided that 100% of all rentals would apply on the purchase price which was the total

of (1) a purchase price at the beginning of the lease of $92,220, (2) a purchase option charge of 1-1/4% of $92,220 per month until the option was exercised, (3) repair costs incurred by Arnold, and (4) any taxes charged against the equipment. The option to purchase was to continue and could be exercised at any time until the termination of the "Equipment Rental Agreement." (Ex. 2-P).

The excavator was a used piece of equipment which had been purchased by Arnold some nine months earlier in April, 1977. (T. 135). At the time it was purchased by Arnold it had a retail value of $98,000. (T. 135). It had been used as a demonstrator model in Idaho Falls, Idaho, and had also been rented. (T. 164). Arnold flew Mr. Balls to Idaho Falls to examine the excavator in an effort to get him to purchase it. (T. 224).

Sometime later Mr. Byerline, a salesman of Arnold, and Mr. Johns and Mr. Balls discussed the purchase of the excavator and it was explained that a 20% down payment would be required on a conditional sale. (T. 130). Utah Excavating did not have the required down payment but still wanted to purchase the excavator. (T. 263). Mr. Byerline suggested entering into a lease with an option to purchase so that "by the equity they were building up by their monthly rental payments" they would have paid enough to constitute a down payment

in six months. (T. 131). If all went as planned it was contemplated that the option to purchase would be exercised after the down payment was accrued if Utah Excavating could arrange for financing of a purchase. (T. 171). Mr. Byerline indicated that they were not required to exercise the option to purchase at six months, but they could continue to rent if they desired. (T. 171). Mr. Byerline was willing for them to continue to rent beyond six months as long as they kept current in their payments. (T. 139). Arnold filed a financing statement with the Secretary of State (T. 78).

Utah Excavating made a payment upon receiving the equipment by a check which failed to clear the bank. Thereafter, they made two payments in February, 1978, a payment in June, 1978, and a payment in July, 1978. (Ex. 4-P, 9-D). The total payments made by Utah Excavating amounted to $17,103.32. (T. 103).

During June and July, 1978, Arnold made several contacts with Utah Excavating to get them to bring their payments current. Then in August Arnold requested that Utah Excavating return the equipment, which Mr. Balls did on August 22. (T. 317, 318).

Even after the equipment was repossessed Arnold expressed the willingness to return the equipment to Utah Excavating if the payments were brought current and Arnold also encouraged

Mr. Balls to exercise the option to purchase. (T. 318, 321). Mr. Balls attempted to obtain financing to exercise the option (T. 256, 257), but before he could do so, on September 7, 1978, Arnold had entered into an agreement to lease the equipment with an option to purchase to Salt Lake County for $4,400 per month at a purchase price of $85,000 and an option charge of 1% of $85,000 per month with 100% of the monthly lease payment to apply on the purchase price. (Ex. 7-D).

Arnold did not give Utah Excavating notice that it was entering into the lease-option to purchase agreement with Salt Lake County, or that it intended to dispose of the equipment. (T. 79, 148, 149, 203).

Arnold received five rent payments from Salt Lake County totaling $22,000 and in March, 1979, Salt Lake County purchased the equipment for $66,400 after requesting bids as required by law. (T. 97, 142, Ex. 10-D).

At the trial it was stipulated between the parties that if Utah Excavating exercised their option to purchase the equipment after December 30, 1977, then to do so at the following times they would have to have paid the following amounts plus the cost of any major repairs for normal wear and tear paid by Arnold up until the time the option was exercised: after six months - $75,736.50; after twelve months - $59,253; after fifteen months - $51,011.25; after twenty-four

months - $26,286. (T. 90-92). It was further stipulated by the parties that the actual cost for repairs performed during the first six months was $736.96. (T. 90).

After 36 months the purchase option price would have been calculated as follows (T. 43):

Purchase Price	$ 92,220.00
Plus Purchase Option Charge ($92,200 x 1-1/4% x 36):	41,499.00
Subtotal	133,719.00
Less 100% of Rental Payments ($3,900 x 36):	140,400.00
Excess of Rental Payments Over Option Price Available to be Applied Against Cost of Major Repairs for Normal Wear and Tear Paid by Plaintiff Until Option Exercised	(6,681.00)

The cost of major repairs for normal wear and tear on equipment like the one involved herein was reasonably estimated to be between $1,500 and $3,000 per year. (T. 297). The reasonable useful life of the equipment was between 8000 and 9000 hours of operation under normal conditions. (T. 137, 224). Normal useage of the equipment would be between 1500 and 2000 hours per year. (T. 137). The equipment would have a useful life of between five to six years before a major overhaul would be required. (T. 137).

The fair market value of the equipment on and after December 30, 1977, at the following times was estimated to be: On December 30, 1977 - $92,220 (T. 233); after six months -

$90,000 (T. 236); after twelve months - $85-86,000 (T. 244); after fifteen months - $80-81,000 (T. 245); after twenty-four months - $77-78,000 (T. 245); and after thirty-six months - $70,000 (T. 314). At the time Utah Excavating executed the "Equipment Rental Agreement" Mr. Balls anticipated the equipment would have those fair market values. (T. 245).

B. FACTS STATED BY PLAINTIFF-APPELLANT ARNOLD IN ITS BRIEF WITH WHICH DEFENDANT-RESPONDENTS DISAGREE.

Utah Excavating's financial situation was not typical of the 75 to 80 percent who do not exercise the option to purchase. (T. 133). Most of those who do not exercise the option have only a temporary need for the equipment. (T. 134). There is no testimony from Mr. Balls or Mr. Johns that the reason for the lease was to give them time to determine whether their work would last.

Utah Excavating attempted to arrange financing right up until the time the equipment was leased to Salt Lake County. (T. 256, 257).

All of the parties recognized and agreed, and the Court found that the lease would continue and the option could be exercised at any time after the minimum six month period for so long as Utah Excavating desired if they were not in default under the agreement. (T. 139, 171, 172, 203, 240, 266,

267, 294, 311, 312). Arnold was even willing to return the equipment to Utah Excavating after it had been repossessed if the payments were brought current. (T. 321).

Mr. Johns did contemplate what the machine would be worth after six months, but had not made any calculations as to an exact figure. (T. 190). Mr. Balls was the partner knowledgeable as to equipment values.

Utah Excavating did not terminate the lease, but attempted to arrange financing even after the equipment was returned (T. 256, 257).

Salt Lake County paid five months rent totaling $22,000. (T. 142). The purchase option price to the County after five months would have been $67,250. (T. 142). The County did not elect to not exercise its option. It was required by law to ask for public bids. (T. 143).

The Court did not state that it was a waste of its time to consider the intention of the parties as to when the option would be exercised and did not preclude the presentation of evidence on that issue (T. 268).

ARGUMENT

POINT I

BECAUSE UTAH EXCAVATING HAD THE OPTION TO BECOME THE OWNER OF THE EQUIPMENT FOR NO ADDITIONAL CONSIDERATION, THE LEASE WAS INTENDED FOR SECURITY AS A MATTER OF LAW.

The application of Article 9 of the Utah Uniform Commercial Code (U.C.C.) to leases is set forth by U.C.A. § 70A-9-102(2) which states:

> This chapter applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security.

Also, U.C.A. § 70A-1-201(37) provides:

> Whether a lease is intended as security is to be determined by the facts of each case, however, (a) the inclusion of an option to purchase does not of itself make a lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration for a nominal consideration does make the lease one intended for security.

In Peco, Inc. v. Hartbauer Tool & Die Co., 500 P.2d 708, 11 U.C.C. Rep. 383 (Oreg. 1972) the court discussed the above quoted provision of the U.C.C. and said:

> At first glance the provisions of the above section may be somewhat confusing, probably because they are stated in the inverse order of importance. However, upon a careful reading of the entire section it is clear that the first question to be answered is that posed by clause (b) -- whether the lessee may obtain the property for no additional consideration or for a nominal consideration. If so, the lease is intended for security. If not, it is then necessary to determine "by the facts

> of each case" whether the lease is intended as security and, in making that determination, the fact that the lease contains an option to purchase "does not of itself make the lease one intended for security".
>
> The cases construing the above section have uniformally held that if the lessee, upon compliance with the lease, has the option to purchase the property for no additional consideration, or for a nominal consideration, the lease is a security interest as a matter of law.

In the instant case the "Equipment Rental Agreement" (Ex. 1-P) and the "Rental Equipment Purchase Option" (Ex. 2-P) provided that the option could be exercised at any time until termination of the Rental Agreement and that 100% of all rent payments would apply toward purchase.

The termination provisions of the "Equipment Rental Agreement" are as follows:

> Arnold Machinery Company, Inc., . . . hereinafter called the lessor, hereby leases to Utah Excavating . . . hereinafter called the lessee, for a minimum period of six months and thereafter until the equipment is returned or until lessor terminates the lease, the equipment hereinafter described, according to the terms and provisions hereinafter stated . . .
>
> 1. The rental period shall begin on and include the date of shipment to the lessee and shall end on and include the date of return to the lessor's warehouse or receiving point. If equipment is kept longer than the specified minimum rental period, the rental shall continue at the same rate, with a pro-ration of rentals

> on any combination of monthly, weekly or daily rates which is to lessee's advantage.
>
> 8. . . . If for any other reason lessee desires to discontinue the use of said machinery or equipment, the only remedy of lessee shall be to return the machinery to lessor and terminate this contract as here and elsewhere provided for.
>
> 9. . . . The lessor reserves the right to remove the equipment at lessee's expense from the job at any time when in its opinion the equipment is in danger because of strikes or any other condition.
>
> 15. . . . The lessor . . . shall have the privilege of removing said machinery and equipment on 24 hours notice if it is being overloaded or taxed beyond its capacity or in any other manner abused or neglected.
>
> 17. Should any of the provisions of this lease be violated by lessee the rental for the entire period herein specified may, at the option of lessor, become forthwith due and payable and the lessor, or its agents may, without notice, enter the premises occupied by lessee without being a trespasser thereon and take possession of and remove said equipment with or without process of law.

Thus, Arnold was given the right to terminate the agreement for certain enumerated causes including Utah Excavating's default, but if there was no default or other cause to terminate the agreement it was to continue. Utah Excavating was given the right to return the equipment and terminate the agreement.

By applying 100% of all the $3,900 per month rent payments toward the purchase after 36 months $140,400 would

have been paid, which amount is in excess of the purchase price of $92,220 plus the option charge at that time of $41,499, which together total $133,719 (T. 43). The excess of $6,681 would be available to cover any repair costs incurred by Arnold and Utah Excavating could become the owner for no additional consideration.

A case which is squarely on point with the instant case is United Rental Equipment Company, Inc. v. Potts and Callahan Contracting Company, Inc., et al., 231 Md. 552, 191 A.2d 570 (1963), in which the court stated:

> The following facts are revealed by the record. On August 19, 1960, United Rental Equipment Company, Inc. (United) transferred possession and the right of use of . . . [the equipment] . . . to one Edward Wuensche under a document entitled "Crane Rental Contract" which recited that the compressor and other items of mechanical equipment were leased by United to Wuensche and set forth provisions as to the use, operation and maintenance of the equipment. It was provided that the rental would be $800 per month for the compressor for a minimum period of one month and that 'after expiration of the minimum term . . . the lessee shall pay . . . the same rental per month . . . until the aforesaid equipment is returned to the lessor' . . .
>
> In the agreement the lessee agreed to pay all sales and use taxes. The lessor reserved the right to terminate the lease at any time if the equipment was being overloaded, abused or neglected, or if it was in danger because of strikes or other conditions, or for violation by the lessee of any provisions of the lease. It was agreed also that eighty-five percent of the rental

of the compressor was to be applied on the specified purchase price thereof of $14,500.

* * *

We think the agreement was a security interest created by contract . . .

United argues that the lease was only for a term of one month, that neither lessor nor lessee could extend it without the consent of the other at the time and that either could arbitrarily terminate the lease at any time after the expiration of the first month. On the premise the lease was but for one month, it is argued that Wuensche had neither the right nor the option to become a purchaser of the compressor at the expiration of the some 21 months it would take for the application of eighty-five percent of the $800 monthly rental to the purchase price to aggregate $14,500.

We do not so read the agreement, we think the parties contemplated the purchase of the compressor by Wuensche if he continued to pay the specified monthly rental and otherwise complied with the lease. The lease says:

> After expiration of the minimum term herein set forth, the lessee shall pay to the lessor the same rental per month as hereinabove provided . . . said rental shall start from the date of original shipment to the above designated site and shall continue until the aforesaid equipment is returned to the lessor.

The only option given the lessor to terminate the lease is for enumerated causes. This is consistent with an extended period of rental payments to be determined solely by the lessee.

Similarly in the instant case upon compliance with the terms of the lease Utah Excavating had the option to become

the owner of the equipment for no additional consideration and, thus, the lease was intended for security as a matter of law.

POINT II

FURTHERMORE, BECAUSE UTAH EXCAVATING HAD THE OPTION TO BECOME THE OWNER OF THE EQUIPMENT FOR A NOMINAL CONSIDERATION, THE LEASE WAS INTENDED FOR SECURITY AS A MATTER OF LAW.

In FMA Financial Corporation v. Pro-Printers, 590 P.2d 803 (Utah 1979), this Court set out three tests for determining what constitutes nominal consideration under U.C.A. § 70A-1-201(37).

TEST 1. COMPARE THE OPTION PRICE WITH THE ORIGINAL LIST PRICE OR COST OF THE PROPERTY.

The original list price of the property was $98,000 when Arnold purchased it from the manufacturer in April, 1977, (T. 135), and $92,220 when Utah Excavating executed its agreement with Arnold on December 30, 1977. (Ex. 2-P). The option price is determined at the time the option is to be exercised as follows: Purchase price ($92,220) plus purchase option charge ($92,220 x 1-1/4% x number of months) - 100% of total payments ($3,900 x number of months) plus cost of major repairs necessitated by ordinary wear and tear (Ex. 2-P). This would be:

Date	Option Price	% of List Price ($92,220)	% of List Price at $98,000
June 30, 1978	$ 75,736.50	82%	77%
December 30, 1978	59,253.00	64%	60%
March 30, 1978	51,011.25	55%	52%
December 30, 1979	26,286.00	29%	27%
December 30, 1980	(- 6,681.00) Payments Exceed Option Price	0%	0%

The option prices listed above do not include the cost of major repairs which were $736.96 for the first six months and it was estimated that they would be approximately $3,000 per year although the witness listed several items in that figure which are not major repairs. (T. 297).

"Nominal consideration may be more than a few dollars," Peco, supra at 385. An option price "should only be characterized as substantial, or nominal, when considered in relation to some other amount." Crown Cartridge Corp., 220 F.Supp. 914 (S.D.N.Y. 1962).

After December 30, 1979, which would be more than 24 months after the lease was executed the option price would have been less than 25% of the list price and that percentage would have decreased until 36 months at which time no consideration would have been required to exercise the option.

TEST 2. COMPARE THE OPTION PRICE WITH "SENSIBLE ALTERNATIVES."

The excavator had a useful life of between five and

six years before a rebuild of $20,000 would extend its life three or four more years. (T. 137-138). Arnold's salesman represented that Utah Excavating was building up an "equity" with each payment. (T. 131). That equity after six months was $23,400 (6 x $3,900). For Utah Excavating to forfeit an equity of $23,400 on a machine that had a remaining useful life of about five years would not be a sensible alternative if there was any way to avoid it. Of course, the amount of the forfeiture increases to $46,800 after 12 months, $64,800 after 18 months, and $93,600 after 24 months. The longer the agreement continued the less sensible it became for Utah Excavating to not exercise the option.

In In Re Royer's Bakery, Inc., 1 U.C.C. Rep. 342 (E.D.Pa. 1963), where 80% of all rentals paid applied to the purchase price the court held:

> A provision such as this in the lease readily provides a devise for financing the purchase of equipment. By crediting earlier payments of rent to the purchase price, the lessee is accorded an equity or pecuniary interest in the subject matter of the lease which he may recover at his option.
>
> It would seem therefore, that whenever it can be found that a lease agreement concerning personal property contains provisions the effect of which are to create in the lessee an equity or pecuniary interest in the leased property the parties are deemed as a matter of law to have intended the lease as security. . . .

TEST 3. COMPARE THE OPTION PRICE TO THE FAIR MARKET VALUE OF THE PROPERTY AT THE TIME THE OPTION IS TO BE EXERCISED.

This is the most relevant test in determining whether the option price is nominal. FMA, supra, at 806.

In Comment, Leases as Security Agreements and the Effect of a Failure to Notify on a Secured Party's Recovery of a Deficiency Judgment: FMA Financial Corp. v. Pro-Printers, 1979 Utah Law Review 567 at 569 it states:

> It has been argued that the difference between a true lease and a secured transaction hinges upon whether the lessee acquires an equity of ownership through his rental payments, i.e. does the rent amount 'to a credit against the payment which the lessee must ultimately make in order to acquire title'. In this context an option price which is significantly less than the fair market value of the property at the end of the lease suggests that the 'lessee' has been building up equity through rental payments.

A comparison of the option price with the estimated fair market value of the equipment as Mr. Balls anticipated it would be at the time of executing the lease is as follows:

Date	Fair Market Value	Option Price	% of Fair Market Value
June 30, 1978	$90,000.00	$ 75,736.50	84%
December 30, 1978	86,000.00	59,253.00	69%
March 30, 1979	81,000.00	51,011.25	63%
December 30, 1979	78,000.00	26,286.00	34%
December 30, 1980	70,000.00	Payments exceed Option Price	0%

Commentators have suggested that based on an analysis

of the decided cases an option price which is less than 50% or even 80% of the fair market value should be considered nominal. Leary, Leasing and Other Techniques of Financing Equipment Under the U.C.C., 42 Temp. L.Q. 217, 250 (1969) and Peden, The Treatment of Equipment Leases as Security Agreements Under the Uniform Commercial Code, 13 Wm. & Mary L. Rev. 110, 144 (1971).

In the instant case the 80% mark is reached shortly after six months and the 50% mark at approximately 18 months. After 36 months Utah Excavating could become the owner of an excavator worth $70,000 having a useful life of from two to three years for no additional consideration.

The continuation of the agreement and the exercise of the option at 36 months was a very realistic and reasonable alternative. The option charge at that time would have been $41,499 ($92,220 x 1-1/4% x 36). Figured on a purchase price of $92,220 over three years this is the equivalent of 15% interest per year ($92,220 x 15% x 3).

Considering all three tests it is clear that Utah Excavating upon compliance with the terms of the agreement had the option to become the owner of the excavator for a nominal consideration and, therefore, the lease was intended for security as a matter of law.

POINT III

THE TRIAL COURTS FINDING THAT BASED ON THE FACTS OF THE CASE THE EQUIPMENT RENTAL AGREEMENT WAS INTENDED AS SECURITY SHOULD BE SUSTAINED ON APPEAL.

In First Western Fidelity v. Gibbons and Reed Co., 27 U.2d 1, 492 P.2d 132 (1971) this court stated:

> . . . We survey the evidence in the light favorable to the trial courts findings . . . Where the appellants position is that the trial court erred in refusing to make certain findings essential to its right to recover, and insists that the evidence compel such findings, it is obliged to show that there is credible and uncontradicted evidence which proves those contended facts with such certainty that all reasonable minds must so find. Conversely, if there is any reasonable basis either in the evidence or from the lack of evidence upon which reasonable minds might conclude that they are not so convinced by a preponderence of the evidence, then the findings should not be overturned.

Arnold's primary contention on appeal is that the trial judge was mistaken in finding that the Equipment Rental Agreement could have continued after the six months minimum term and that Arnold neither intended to terminate nor had the right to terminate the agreement so long as Utah Excavating remained current in their payments. Based on the evidence and testimony of the parties the trial judge ruled:

> My immediate construction right now is that if the parties remain current in their payments that this lease could have

> gone on indefinitely, under the wording of this particular lease, unless they violated one of the provisions hereinafter provided for in the lease. And if they violate those provisions then they have cause or grounds to set it aside. I think that was the intent of the parties. It appears from the testimony that I have heard in this matter thus far. . . . I think you are correct when you state, of course, that the testimony is that they expect to convert it. But I think under the terms of the lease, if that expectation didn't materialize, they could have continued to lease it. (T. 312).

There is ample evidence to sustain this finding (T. 139, 171, 172, 203, 240, 266, 267, 294). The only other testimony relating to this question is that the parties expected to exercise the option after six months. (T. 212, 234). This expectation was in no way limiting on Utah Excavating's right or ability to exercise the option at any time after six months if it desired or needed for whatever reason to continue under the Equipment Rental Agreement. As discussed earlier at page 18, that was not an unrealistic or unreasonable alternative from a financial standpoint. Therefore, the trial Court's finding on this factual matter should not be disturbed.

The appellant has stressed that Utah Excavating entered into a "lease" rather than a "conditional sales contract." This is of little significance in determining whether the "lease" was intended for security. In In Re Transcontinental Indust., Inc., 3 U.C.C. Rep. 235 (N.D.Ga. 1965), the court stated

> In determining the real character of a contract, courts will always look to its purpose rather than to the name given to it by the parties.

The purpose of the Equipment Rental Agreement in the instant case was to enable Utah Excavating to acquire an equity in the excavator. (T. 131).

An analysis of the terms and provisions of the agreement (Ex. 1-P) reveals that the "lessee" bears all of the risks and burdens except performing major repairs necessitated by ordinary wear and tear (Ex. 1-P, paragraph 3), and even this expense is reimbursed when the option is exercised. (Ex. 2-P, paragraph 3). The lessee among other things pays for all other maintenance, bears the risk of loss because of defects, pays all taxes, bears the risk of any damage, and pays for insurance. (Ex. 1-P).

In view of all the evidence that exists to support the trial court's finding that the agreement was intended for security, this court should sustain that finding. Appellant has not shown any credible and uncontradicted evidence which proves the facts it contends with such certainty that all reasonable minds must so find as it must do to enable this court to overturn the trial court's finding.

POINT IV

NO DEFICIENCY EXISTED AND EVEN IF ONE HAD EXISTED ARNOLD WOULD NOT BE ENTITLED TO IT BECAUSE IT FAILED TO GIVE

UTAH EXCAVATING THE NOTICE OF SALE REQUIRED BY U.C.A. § 70A-9-504(3).

The consequence of the Equipment Rental Agreement being found to be intended for security is that the remedies available to Arnold upon Utah Excavating's default are governed by U.C.A. 70A-9-504(3) which states:

> . . . Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

In FMA Financial Corporation v. Pro-Printers, supra, regarding deficiency judgments, this court stated:

> In an action for a deficiency judgment such as this the secured party has the burden of establishing that the disposition of the property was done in a commercially reasonable manner, and that reasonable notice to the debtor was given.
>
> * * *
>
> . . . Many courts have held the secured party may obtain no deficiency from the debtor if it fails to give the debtor reasonable notice (590 P.2d at 806, 807).

The main objectives of the notice requirement are to give the debtor an opportunity to exercise his rights to redeem the collateral and to allow him to insure the commercial

reasonableness of the sale. It is not a burdensome requirement on the secured party, but the failure to provide the notice can have severe consequences upon the debtor. The law abhors a forfeiture which results from failure to give a notice of sale. Utah Excavating was still trying to arrange financing to protect its equity when without notice the equipment was disposed of.

The option price upon execution of the agreement was $92,220. Utah Excavating paid $15,600 in rent payments to Arnold. Arnold received $22,000 in rent payments and $66,400 on the sale of the equipment from Salt Lake County, making a total of $104,000 it received on a piece of equipment having a purchase price of $92,220. In view of this it is difficult to understand how Arnold can claim that any deficiency exists on the equipment.

CONCLUSION

As a matter of law the Equipment Rental Agreement was intended for security because Utah Excavating upon compliance with the terms of the agreement had the option to become the owner of the excavator for no additional consideration or for a nominal consideration. The trial court's finding that the agreement was intended for security should be sustained. Because Arnold failed to give Utah Excavating the required

notice of sale, it would not be entitled to a deficiency judgment even if one existed.

Respectfully submitted,

RICHARDS, BIRD & KUMP

By: James M. Richards
James M. Richards
Attorney for Defendant-Respondent Richard S. Johns II

CERTIFICATE OF MAILING

I hereby certify that I delivered two copies of the foregoing Defendant-Respondent's Brief to Richard C. Dibblee, attorney for David M. Balls, Suite 400, Ten Broadway Building, 10 West 300 South Street, Salt Lake City, Utah 84101, and to John W. Lowe, Lowe & Associates, attorney for Arnold Machinery Company, 1011 Walker Bank Building, Salt Lake City, Utah 84111, this 3rd day of July, 1980.

James M. Richards
James M. Richards